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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

Nos. ~~310 and 361~~

ALLIED CHEMICAL & ALKALI WORKERS OF AMERICA, LOCAL UNION No. 1, *Petitioner*,

v.

PITTSBURGH PLATE GLASS COMPANY, CHEMICAL DIVISION, ET AL., *Respondents*.

NATIONAL LABOR RELATIONS BOARD, *Petitioner*,

v.

PITTSBURGH PLATE GLASS COMPANY, CHEMICAL DIVISION, ET AL., *Respondents*.

On Writs of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF MANUFACTURERS OF THE UNITED STATES OF AMERICA, AS AMICUS CURIAE, IN SUPPORT OF RESPONDENT PITTSBURGH PLATE GLASS COMPANY, CHEMICAL DIVISION

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With consent of the parties, the National Association of Manufacturers of the United States of America respectfully submits this brief as *amicus curiae* in support of the Respondent, Pittsburgh Plate Glass Company, Chemical Division.

INTEREST OF THE AMICUS CURIAE

The National Association of Manufacturers is a nonprofit voluntary business organization composed of manufacturing concerns, including corporations, partnerships, sole proprietorships, and other forms of business enterprises located throughout the United States and its territories. Most of its members engage in interstate commerce and are therefore subject to the provisions of the National Labor Relations Act.

This case involves certain aspects of the broad question whether an employer is required to bargain with former employees, or with a union claiming to represent such former employees, in regard to pensions, insurance or other matters.

A decision requiring such bargaining would go far beyond the present law and would open up a vast new area of collective bargaining on new subjects with a large new class of persons who have not heretofore been regarded as employees entitled to bargain under the National Labor Relations Act. Accordingly, the case could substantially affect the industrial relations of employers generally, including the members of this Association.

Moreover, a decision requiring such bargaining would compel employers to bargain in regard to reopening and changing the terms of previous collective bargaining agreements that have long since been performed and have expired, and renegotiating the wages, deferred compensation, and other benefits specified therein. This case, therefore, could have a major economic impact and possibly serious consequences with respect to costs, prices, and other financial aspects of the operations of employers generally, including the members of this Association.

Accordingly, the Association has an interest in the proper resolution of the issues before the Court in this case.

SUMMARY OF ARGUMENT

The Court of Appeals ruled that retirees are not "employees" within the meaning of the National Labor Relations Act, that they are not members of a "unit appropriate for the purposes of collective bargaining" within the meaning of that Act, and that therefore they are not persons with whom or about whom an employer is required to bargain under that Act. These rulings, we believe, are entirely correct and are dispositive of the case. Argument on these points is fully presented in the brief of the Respondent company and is not repeated here.

This *amicus* brief seeks to present further important legal and practical considerations which support and require the decision reached by the Court of Appeals.

Pensions and insurance benefits of persons already retired are nothing more nor less than deferred compensation paid to them pursuant to the terms of contracts that were in effect during their active employment. They are governed by the terms of such contracts. To require an employer to bargain in regard to reopening such contracts and renegotiating the pensions and insurance benefits provided therein is contrary to all principles of contract law and contrary to the purpose of Congress in Section 301 of the Taft-Hartley Act to make collective bargaining agreements legally binding and enforceable contracts between the parties.

In addition, a requirement of mandatory bargaining on such matters would almost inevitably result in in-

creasing an employer's labor costs long after the labor has been performed and the articles produced have been sold, delivered and paid for. Consequently, an employer could not count on firm costs in making his plans regarding prices, profits, and other aspects of the operation of his business.

Moreover, the Board's ruling would create conflicts of interest because the union would be representing two different groups, current employees and retirees, whose interests are different and conflicting in numerous respects. The Board is unable to cope adequately with such conflicts of interest, as the Board itself has admitted in earlier cases.

If the principle of mandatory bargaining with retirees is established, the Board would almost inevitably have to put retirees in a bargaining unit of their own in some future cases where they desire to be represented by their own union in their own separate bargaining unit. This would create a situation where the collective bargaining procedures of the Act would be wholly inappropriate. The Act envisions bargaining between parties free to use their economic strength but also subject to economic restraints because both parties lose when the business is shut down by a strike or curtailed by picketing or other activities. There would be no such restraint in the case of retirees who have no current wages to lose and no jobs in which they may be replaced. Thus disputes with retirees and any accompanying picketing or other activities could continue endlessly, contrary to the purposes of the Act. As experience has shown (e.g., in the coal industry) the mere presence of retiree pickets would act as a signal and an inducement for work stoppages and thus vastly broaden the area of strikes and labor unrest.

Furthermore, there is no need for mandatory collective bargaining with retirees. Voluntary action of employers, either in the form of voluntary collective bargaining or unilateral action has been adequate to alleviate the problems of retirees and doubtless will continue to do so during the temporary period of inflation which creates the problems. Moreover, the parties are increasingly adding provisions to their pension contracts which automatically adjust benefits to changes in the cost-of-living index or other factors. Such provisions tend to resolve and eliminate the problem.

It was never contemplated by Congress that the process of collective bargaining should be projected beyond the work place and follow employees into permanent retirement; or that it should be so broadly based as to provide cradle-to-grave social security. Collective bargaining is in essence a process by which employees of a particular employer in an established bargaining unit use their collective strength to negotiate the value of their services in terms of wages, benefits and employment conditions. They may choose, and the employer may agree, that part of their wages may be deferred and paid in retirement benefits such as pensions. When their employment terminates by retirement, these benefits become vested and payable. But, since they are no longer performing services to the employer, no basis should exist for using the economic strength of the active employees to upset and renegotiate the value of their past services.

Although the Act mandates bargaining on a unit-by-unit basis, the Board seeks to modify the statutory scheme by adding a new concept of "interest" bargaining under which the unit representative would be

given authority to bargain for classes of persons such as retirees who are outside the unit. This change in the scheme of the Act could only serve to create new areas of conflict and undermine the stability of the collective bargaining process as a means for settling disputes.

ARGUMENT

1. Pension and insurance benefits of persons already retired, being simply deferred compensation paid pursuant to the terms of contracts that were in effect during their earlier employment, are not appropriate subjects for mandatory collective bargaining.

The National Labor Relations Act requires bargaining "with respect to wages, hours, and other terms and conditions of employment." (Section 8(d)) This has been interpreted to require an employer to bargain with his employees about providing pensions and insurance on the theory that such benefits are "wages" and that providing them constitutes one form of payment of wages.

After wages have been agreed upon and specified in a contract and the contract has been performed, the law does not require either party to bargain about changing them. This is true regardless of how the wages are to be paid. It is true with respect to the portion of wages which employees are to receive currently, and it is equally true with respect to any portion of wages which they are to receive as deferred compensation in the form of pension or insurance after their retirement. It is clear beyond all question, we believe, that an employer is not required by law to bargain about increasing the cash wages already paid under past contracts that have been performed. To require him to bargain about increasing the deferred

wages specified in existing or past contracts and payable after retirement is no different. In either case, he would be required to bargain about changing agreed contract terms. Such requirement would not only be contrary to all principles of contract law, it would also be contrary to the purposes of Congress in adopting Section 301 of the Taft-Hartley Act to make collective bargaining contracts legally binding and enforceable against both parties. As stated in the Senate Committee Report, "The committee bill makes collective-bargaining contracts equally binding and enforceable on both parties. . . . Such a policy is completely in accord with the purpose of the Wagner Act which the Supreme Court declared was 'to compel employers to bargain collectively with their employees to the end that an employment contract, binding on both parties, should be made.' (*H. J. Heinz & Co.*, 311 U.S. 514)." S. Rept. No. 105, 80th Cong., 1st Sess., p. 15.

Quite commonly payment of the cost of such deferred compensation is made currently by an employer in the form of an annuity premium or a payment into a pension trust or other similar fund. But whether or not paid currently, it is part of an employer's wage costs and becomes part of his operating expenses which affect his prices, profits, and the entire operation of his business. He cannot go back later and ask his customers for a retroactive price increase to compensate for a subsequent increase in costs for pensions or insurance. He must plan and operate his business on the basis of his current labor costs under his collective bargaining contracts, not on the basis of what his costs might be if those contracts are renegotiated at some future date.

If the Board is successful in establishing the principle embodied in its decision in the present case that employers must reopen prior contracts and rebargain the compensation provided therein for retirees, this could permit employees to reopen other completed employment contracts and demand higher pay or higher benefits on a retroactive basis. Far from contributing to industrial peace or the solution of labor problems, this would invite and promote a new type of industrial strife of virtually unlimited proportions and thus would have consequences entirely inconsistent with the purposes of the Act to encourage labor stability under binding agreements for fixed terms.

2. The Board's ruling creates conflicts of interest with which the Board cannot cope.

Apparently the Board recognized the weakness of its position that retirees are employees within the meaning of the Act, and it was unwilling to rest its case squarely on that ground. Apparently it also recognized that an outright ruling requiring an employer to bargain directly with retirees about increasing their pensions or other benefits provided by contract would be too serious an affront to legal and moral principles regarding repudiation of contract agreements.

Accordingly, the Board sought to ease the retirees under the wing of the union currently representing employees, with the explanation that the current employees would be acting in their own interest in seeking increased benefits for retirees. The Board's approach also serves to mix and confuse bargaining to change past contracts with bargaining for future contracts, and thus to divert attention from the fact that it involves bargaining to change the terms of contracts already performed.

In doing this, however, the Board placed the retirees in a position where they are represented by an agent having serious conflicts of interest. Moreover, the interests of the retirees will always be subordinated and submerged because the retirees have no voice in selecting the bargaining agent or in controlling its actions.

These conflicts of interest were brought to the Board's attention in briefs submitted to it. They were also pointed out in the dissenting opinion of Board Member Zagoria in this case. The Board, however, did not undertake to respond to them in its majority opinion. It ignored them for the very understandable reason that the Board has no competence, facilities, or means to deal with internal conflicts of interest in labor organizations.

The Board itself has disclaimed any expertise or facilities to deal with union conflicts of interest in any meaningful sense. In a case involving such conflict, the Court of Appeals for the First Circuit remanded to the Board "in order that it may assess the potential, not merely the actuality, of conflict of interest and frame an order which, hopefully, will balance the legitimate interests of the Fund, respondent, International, Local 380, and respondent's employees." *NLRB* v. *David Buttrick Co.*, 361 F. 2d 300 (C.A. 1, 1966). That case involved a pension fund—the Teamsters Pension Fund jointly administered by the union and employers. The Teamsters Union was seeking to obtain bargaining rights at Buttrick notwithstanding the fact that the Teamsters Pension Fund had made a loan of $4,700,000 to a competitor company where it already represented employees. Despite the serious conflict questions involved, the Board declined to carry out the Court's mandate. It sought to excuse itself from doing so on

the ground that it does not have the necessary data-gathering facilities or any special expertise in this area. In the Board's own words:

> "In respect to the establishment of safeguards or guidelines to govern union and pension fund investments generally, we share the Court's concern over the 'eroding effects' of conflicts between investment protection and employee representation, which are 'likely to arise with increasing frequency.' 361 F. 2d at 305. Yet, we find many compelling reasons for not formulating general standards in a single proceeding such as this. First, there are several elements of the conflict-of-interest problem—the necessary degree of competition, the different possible types and amounts of investments, various methods of fund administration, etc.,—which have not been developed in the case. Thus, we have reservations as to whether we are sufficiently informed to delimit the relative hazard posed by the different combinations of investment, fund administration, International control over locals, and degree of competition between employers; the participants in this proceeding have not offered a feasible means for doing so. Moreover, we feel that the raw data necessary to devise broad guidelines is not yet available. Respondent in its brief has recognized that the 'field of pension fund investment is a vast one in which much of the basic information is still in the process of compilation.' In addition, the President's Committee on Corporate Pension Funds considered regulatory measures other than the existing disclosure requirements, but failed to recommend such additional regulation in part because of the 'absence of sufficient facts as to the prevalence of abuses.' 'Public Policy and Private Pension Programs' (GPO 1965). We note that Congress is currently considering several proposals for expanding the regulation of pension funds, including certain as-

> pects of fund investments. See H.R. 5741, S. 1024, S. 1103, S. 1255 . . . ."
>
> *David Buttrick Co.,* 167 NLRB 438, at 439-40 (1967).

The Court of Appeals subsequently accepted the Board's excuse and affirmed its ruling that Buttrick must bargain with the Teamsters despite the loan to a competitor company, but it did so on the ground that "There is a strong public policy favoring the free choice of a bargaining agent by employees. This choice is not lightly to be frustrated." *NLRB* v. *David Buttrick Co.,* 399 F. 2d 505 (C.A. 1, 1968).

In the present case before this Court, however, the Board is asking the Court to ignore much more pervasive conflicts of interest and affirm its order which seeks to bring retirees under the Act as employees and at the same time denies them any voice in the selection of a bargaining representative and hence frustrates the very policy which the Court in the *Buttrick* case thought compelled it to accept the Board's ruling because that policy "is not lightly to be frustrated."

Thus the Board asks this Court to approve a ruling which gratuitously imposes on retirees a representative involved in gross conflicts of interest for which the Board has no remedy or solution other than to ignore it or pretend it does not exist. Approval of the Board's position would lay the groundwork for a large group of the very kind of cases of which this Court has said, "The existence of even a small group of cases in which the Board would be unwilling or unable to remedy a union's breach of duty would frustrate the basic purposes underlying the duty of fair representa-

tion doctrine." *Vaca* v. *Sipes,* 386 U.S. 171, at 182-183 (1967).

It seems certain that if the Board's position is accepted the courts will soon be faced with hearing and deciding suits brought by retirees who have not consented to the agency relationship sought to be thrust upon them by the Board and who object to improper or inadequate representation by their Board-appointed agent and seek to repudiate its acts. The Board will also almost certainly be faced with demands and petitions by retirees seeking certification for other unions or associations to represent groups of retirees in separate bargaining units from active employees. This development could hardly be resisted by the Board, and its culmination would then give birth to direct competition between retirees and their representative and active employees and their representative. Thus a whole new battleground of economic conflict and competing pressures on employers would be opened up.

3. Mandatory collective bargaining, as contemplated by Congress and practiced in the industrial world, is not suitable for resolving demands and disputes of former employees.

While collective bargaining may hopefully result in peaceful resolution of disputes, it also contemplates the use of economic weapons when negotiation fails. As this Court has stated, "The presence of economic weapons in reserve, and their actual exercise on occasion by the parties, is part and parcel of the system that the Wagner and Taft-Hartley Acts have recognized." *NLRB* v. *Insurance Agents Union,* 361 U.S. 477, at 489 (1960).

In the normal bargaining situation, a party using such economic weapons is subject to certain built-in restraints. Thus the striking employee, while he exerts

economic pressure on his employer, is also under economic pressure to return to work and resume earning and to avoid being replaced. Similarly, the employer who exerts economic pressure on his employees by a lock-out is, at the same time, under economic pressure to resume normal operation and full production, and to supply his customers and avoid losing them to competitors. Thus the Act envisions bargaining in which the use of economic power is tempered and balanced by countervailing economic restraints.

In the case of former employees, however, there is no such restraint. They have no current jobs or earnings to lose, and no present employment in which they might be replaced. Moreover, as indicated, it seems very likely that in some future cases retirees would be placed in their own bargaining units separate and apart from all active employees, and thus all economic restraints would be removed from the unit.

Although former employees might not have effective strike power of their own, they would have unlimited picketing power with nothing to induce them to cease except capitulation by their former employer. There would be little to prevent retirees from picketing their various former employers almost without limitation. Such picketing alone could be detrimental to the employer's business, and if other employees or unions observe the picket line it could prove to be completely ruinous.* It is apparent, therefore, that a holding that former employees have a right to bargain, and to use economic weapons as part and parcel of that right,

* It is widely known that one union, the United Mine Workers, has utilized retired miners to picket mines and create illegal work stoppages throughout the industry in furtherance of both economic and political objectives.

would invite demands from such former employees that would result in interminable disputes not capable of resolution through collective bargaining.

Thus such holding would have results completely contrary to the policy of the Act to promote settlement of disputes by peaceful means.

4. The Board's extension of the statute to retirees is not justified by need

The Board and the petitioner union and the amicus unions have sought to justify extension of the Act to cover retirees on the ground that there is an unfilled need for mandatory collective bargaining in their behalf. The Board's opinion put it in strong terms—that after an employee has retired is when he "most needs representation." If that were true, the Board would have certainly discovered it sooner than 34 years after enactment of the statute. Even if such need existed, we submit, it would be a matter for Congress to deal with and would not justify administrative and judicial extension of the present statute beyond the fair meaning of its words and beyond the intent of Congress.

Moreover, the Board is in error, we submit, by presuming that the social needs of retirees can be best met by bringing them under mandatory bargaining, including the implicit assumption that the burden of inflation as it affects retirees should be borne by the individual employer.

As illustrated in the examples set forth at page 28 of the Board's brief in this case, employers are not insensitive to the economic problems of retirees resulting from the inflationary trend of the past decade or so. Many employers have voluntarily improved pensions and insurance benefits of retirees so far as they

reasonably could within their means and in light of their other obligations. Some have done so entirely of their own volition, whether or not their employees are unionized. Some have done so after consultation and discussion with unions which might be labeled collective bargaining. But in all cases employers have taken such action voluntarily. The bargaining, if any, was voluntary and permissive, not mandatory under the statute. Such voluntary action of employers has gone far to alleviate the problems and doubtless will continue to do so. Far from being a reason to require mandatory bargaining, this is a reason not to.

Moreover, the parties to collective bargaining have already developed means for accommodating pensions and other deferred compensation to the changing economic conditions of the future. They have provided in their contracts for variable annuities or flexible pensions that increase or decrease automatically in a specified relation to the cost-of-living index or in relation to the income and value of the stocks, bonds, mortgage loans, real estate and other assets in which a pension fund is invested. Obviously, as such flexible arrangements become more and more usual in collective bargaining contracts, the problem of adjusting retirees' pensions to changing economic conditions resolves itself.

Apart from, and in addition to, voluntary adjustments, the Congress will undoubtedly give full and sympathetic consideration to the situation of retirees and take appropriate action. The Congress has already demonstrated its interest in retirees and its sensitivity to their problems in a number of ways—periodic increases in social security benefits, Medicare and Medicaid, creation of a Special Committee on Aging,

protection of pension and insurance plans in the Welfare and Pension Plans Disclosure Act, among others. It is even possible that the Congress might sometime conclude that some form of representation is desirable for retirees. But it is also quite possible that if it does so, it would deal with that subject through legislation entirely separate and apart from the National Labor Relations Act, just as it has already dealt with protection of pension and insurance plans in a separate statute. All of this, of course, is a matter for Congress to determine, and is not within the authority of the Board or the courts.

5. The Board's erosion of the statutory concept of unit bargaining threatens the stability of the bargaining process.

As the Court below noted, and as this Court said in *United Mine Workers* v. *Pennington,* 381 U.S. 657 (1965), the Act mandates bargaining on a unit-by-unit basis. In its decision here, however, the Board espouses a new concept of "interest" bargaining, and while acknowledging that it has consistently excluded retirees from bargaining units the Board seeks to expand the bargaining authority of the unit representative to encompass bargaining for classes of persons such as retirees who are outside the unit. This is done on the assertion that benefits paid retirees "affect" employer funds otherwise available for paying wages and benefits to active unit members. This type of proliferation of the authority of the unit representatives can only serve to create new areas of conflict and undermine the stability of the collective bargaining process as an instrument for settling disputes.

CONCLUSION

For the foregoing reasons, as well as those set forth in the company's brief, we respectfully submit that the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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